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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 759

SAMUEL ROTH, DOING BUSINESS UNDER THE TRADE NAMES AND STYLES OF CANDIDE PRESS, THE MONTHLY BOOK-GEM, PSYCHIC RESEARCH PRESS, ARROWHEAD BOOKS AND HOGARTH HOUSE, PETITIONER

v.

ALBERT GOLDMAN, INDIVIDUALLY AND AS POSTMASTER AT NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order and judgment of the District Court for the Southern District of New York, denying petitioner's motion for an interlocutory injunction and dismissing the complaint on the merits (R. 143-

144) was entered without an opinion. The opinion of the Court of Appeals for the Second Circuit (R. 150-167) is reported at 172 F. 2d 788.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1949 (R. 167). The petition for a writ of certiorari was filed on May 2, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the action of the Postmaster General in adjudging certain printed matter of petitioner fraudulent and other printed matter obscene, coupled with the issuance of the customary fraud and obscenity orders, stopping mail addressed to petitioner, exceeded the Postmaster General's statutory powers or violated the petitioner's constitutional rights.

STATUTES INVOLVED

The applicable parts of the statutes involved are set forth in the Appendix, *infra,* pp. 15-17.

STATEMENT

The petitioner, who brought this suit under his own and his various trade names, complains of four orders issued by the Postmaster General.[1]

1. The first is a fraud order against Psychic Research Press, arising out of the fraudulent advertising of a book entitled "Self-Defense for

[1] A summary of the proceedings in all four orders is set forth in the affidavit of the Post-Office Solicitor (R. 42-49).

Women." This order (R. 15) is a supplement to a main order issued after notice and full hearing before a postal Trial Examiner against Avalon Press, Inc. (R. 115-119), of which petitioner was president (R. 125). On the basis of the advertising matter and the book itself, the Trial Examiner found that the advertising falsely represented the book to be obscene (R. 119). His recommendation for the issuance of a fraud order was approved by the Post-Office Solicitor (R. 120) and the Postmaster General, who issued the main order on January 16, 1947 (R. 43).

This main order was not contested further by petitioner, but about a year later, in an *ex parte* hearing, a Postal Trial Examiner found that under the trade name of Psychic Research Press, petitioner was using the mails to advertise the same book by the same circular (R. 121-125). These findings were approved by the Solicitor (R. 125) and the supplemental fraud order, in identical terms as the main order (R. 120), was issued by the Postmaster General on April 6, 1948 (R. 15).

A copy of this order was served on petitioner, and upon its receipt, petitioner's attorney telephoned the Solicitor's office of the Post-Office Department, and filed a petition to re-open the hearings for the purpose of offering additional evidence and for the revocation of the supplemental order. This petition was denied on April 22, 1948 (R. 29-30). The nature of the alleged additional evidence is not specified anywhere in the complaint or affi-

davits which make up the record. The facts of identity set forth in the supplemental fraud order (R. 125) are not only uncontested, they are affirmatively alleged by the petitioner. Petitioner alleges in his complaint that under the name of Psychic Research Press, he published "Self-Defense for Women" (R. 6), and he shows that he used the same advertisement to sell it. (See, Complaint, Par. "Twentieth," R. 8; and Plaintiff's Exhibit 4, R. 17.)

Petitioner concedes that the book, "Self-Defense for Women," is not obscene, but he denies that the circular advertising it held it out to be obscene (R. 29). The circular (R. 17) suggests that the book illustrates every possible position of physical attacks on women by photographs and drawings of nude and half-nude models; in fact, the book describes various "judo" or "ju-jitsu" holds, illustrated by fully-clothed models (R. 118-119).

2. The second fraud order (R. 18) is a main order against petitioner under his trade name, Arrowhead Books, and arises out of the fraudulent advertising of his novel "Bumarap." This order was also issued after notice and a full hearing before a postal Trial Examiner (R. 44-46; 126-135). On the evidence of the advertising and the book itself, the Trial Examiner found that petitioner falsely represented the book to be obscene (R. 134-135). These findings were approved by the Solicitor (R. 135), and the Postmaster General, who issued the fraud order on April 15, 1948 (R. 18).

Petitioner concedes that "Bumarap" is not obscene but denies that the advertising holds it out to be so (Complaint, Par. "Thirty-Third," R. 11). The circular (R. 20) quotes two erotic passages and represents them to be typical of the contents of the book; but, in fact, the book deals primarily with adventures that do not involve any matters of a sexual character (R. 135).

3. The third fraud order (R. 22) of which petitioner complains, involves the Hogarth Press, another trade name of the petitioner, and is a supplement to the above order against petitioner doing business under the name of Arrowhead Books. This supplemental fraud order was issued on April 22, 1948, only six days after the main order. It was necessitated because of clear evidence that petitioner was using the name Hogarth House to fill orders for "Bumarap." He merely crossed out Arrowhead Press on the return cards for orders and typed in "Hogarth House" (R. 136-138).

Petitioner did not seek any hearing on this supplemental order, and he has told two contradictory stories about the charge of identical fraud, on which the order against Hogarth Press rests. In his verified complaint, petitioner Roth swore that "in fact, Hogarth House was never used for the sale of the book 'Bumarap'" (Complaint, Par. "Thirty-Sixth," R. 12). He repeats this story in his affidavit in support of the application for a temporary injunction against the New York Postmaster (R. 31-32).

Now, in his petition for certiorari to this Court, petitioner tells a different story: that Hogarth House was (Pet. 6)—

> a trade-name under which he published trade-books, among them the novel *Bumarap,* sold this time by means of a penny post-card against which the Post Office Department had made no objection.

Since this contention is raised in this Court for the first time, the record does not contain a copy of the post card.

4. The fourth order (R. 14) of which petitioner complains involves a single book, "Waggish Tales of the Czechs" and several fictitious trade names under which petitioner advertised and sold it through the mails. The order was issued after notice and a full hearing before a postal Trial Examiner (R. 46-49). The evidence before the Trial Examiner consisted of the book itself and, in addition, petitioner presented a witness, Mr. Shaemas O'Sheel, as a literary expert, who testified that in his opinion, the book was broad but not obscene (R. 91). The Trial Examiner received this opinion for what it was worth (R. 58, 90). Petitioner's attorney agreed that "the case stands or falls on the contents of the book * * * itself" (R. 112), and the Trial Examiner reported that "a thorough examination and a reasonable, sensible study of said book shows it to [be] obscene" (R. 59).

These findings were approved by the Solicitor (R. 59) and the Postmaster General, who issued an order on April 22, 1948, excluding from the mails all matter addressed to the Candide Press or the Monthly Book Gem (R. 14-15). Petitioner claims that the book is not obscene. The book itself is not in the record, though it was, of course, before the Postmaster and the courts below, but it is adequately described by the Court of Appeals opinion, as being composed of ninety-six "smoking room jests and stories, obscene or offensive enough by any refined standards and only saved, if at all, by reason of being both dull and well known" (R. 151). These crude obscenities are told in a style as if "from another era and another clime." (R. 151). Petitioner describes the book as relating "contemporary smoking-room stories in Fourteenth Century Chaucerian English" (Pet. 9). The lewd character of the jokes can be sampled by the descriptions of them in the hearing before the Trial Examiner (R. 91, 102, 105).

On June 2, 1948, petitioner filed a complaint (R. 2-13) in the United States District Court for the Southern District of New York and prayed for a temporary injunction enjoining the New York Postmaster from enforcing the above-described mail fraud orders and the obscenity order. The Government cross-moved for summary judgment on June 18, 1948 (R. 36). On July 16, 1948, the District Court, after a hearing, without opinion,

denied plaintiff's motion for a temporary injunction and granted the motion on behalf of the New York Postmaster, for summary judgment, dismissing the complaint on its merits (R. 143-144).

On appeal, the judgment of the District Court was affirmed (R. 167) with a brief *per curiam* opinion of A. N. Hand and Clark, J. J. (R. 150-151), and a concurring opinion by Judge Frank (R. 152-167).

ARGUMENT

1. The principal issue in this case concerns the validity of the Postmaster General's order preventing petitioner from using the mails to sell an obscene book, entitled "Waggish Tales of the Czechs." The court below reached the conclusion that there had been no abuse of administrative discretion in connection with the exclusion of the above-named book from the mails (R. 151), in which conclusion Judge Frank concurred with "puzzlement" (R. 152). The *per curiam* opinion states that although the standards of obscenity are "imprecise," the stories comprising the book are obscene by any refined standards (R. 151). In the circumstances, there is no occasion in this case to review the standards for determining whether a given literary product is obscene. Here, we have a book composed of a collection of smoking-room jokes which certainly are obscene under the old judicial rule which excluded from the mails a book containing in any part any matter dealing with sexual impurity that would corrupt some person into whose

hands it might fall. *United States* v. *Kennerley,* 209 Fed. 119 (S.D. N.Y.). The book here involved is also obscene by the more recently announced standards which judge a book as a whole and distinguish between creative, esthetic works and pornography. *United States* v. *One Book Entitled Ulysses,* 72 F. 2d 705 (C.A. 2); see also *United States* v. *Kennerley, supra.* There is nothing scientific about this book. *Parmelee* v. *United States,* 113 F. 2d 729 (C.A. D.C.). And there is no problem of parts, since all of the items in the book are of the same character. The literary style is spurious; as petitioner's witness said, the disguise of an "archaic scholarly style * * * grows a little tiresome" (R. 91). This style wears off like the "lamp black" smudge that could be erased from the indecent pictures involved in *Rosen* v. *United States,* 161 U. S. 29, 31. The condemnation of "Waggish Tales" does not threaten other works. From all the descriptions in the record, it is a clearly recognizable item of pornography, a collection of lewd jokes.

The difficulty in the case mentioned by the court below is with the subject of obscenity in general, not with this item in particular. The subject of obscenity is judicially imprecise, because "There can never be constitutive principles for such judgments" *United States* v. *Levine,* 83 F. 2d 156, 157 (C.A. 2). It can easily be shown, as Judge Frank demonstrates, that what is obscene varies with times and places. Judge Learned Hand wisely observed that the legal definition of obscenity should vary

with the "compromise between candor and shame at which the community may have arrived here and now" *United States* v. *Kennerley,* 209 Fed. 119, 121 (S.D. N.Y.). See, *Parmelee* v. *United States,* 113 F. 2d 729 (C.A. D.C.). This standard varies, but it is not the vague standard of "good" or "bad" literature which this Court condemned in *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 151, and which petitioner appears to confuse with the standard of obscenity (Pet. 11). The term obscenity is a valid norm. 327 U. S. at p. 158.

The standard of obscenity, while difficult, is not as confusing as Judge Frank suggests. The statement that the law once allowed a subjective test of what the author intended is not accurate (R. 160). In the *Ulysses* case, *supra,* the court abandoned the test of excerpts, and sought to judge the book as a whole, taking into account whether the work was a serious representation of human experience. The test of a genuine esthetic effort by the artist is, however, an objective one, and the esthetic effort is judged by its effect upon others. 72 F. 2d at pp. 707, 709. The judgment of the administrative officer is, in the end, like a jury verdict, "*ad hoc* legislation" applying the standard of a reasonable man. *United States* v. *Levine,* 83 F. 2d 156, 157 (C.A. 2).

In the case at bar, the postal Trial Examiner, the Solicitor and the Postmaster General occupy, in the statutory scheme, the place of a jury. The Trial Examiner, after a full hearing, found as a "reasonable, sensible" man that the book in question is

obscene (R. 59). That conclusion was concurred in by the Post-Office Solicitor and the Postmaster General; it was upheld as reasonable by the district judge and two judges of the Court of Appeals, each of whom had the book before him.

Petitioner makes no specific attack upon this finding. The testimony of the literary expert offered by him at the postal hearing (R. 91) does not purport to show that the book has an accepted place in the arts, and such testimony therefore, lacks completely the evidentiary force of "the opinions of competent critics in published reviews." *United States* v. *Levine,* 83 F. 2d at 157. The Postmaster General applied the standards of a reasonable man to the book as a whole. The book itself was the best evidence of its character. An order of the Postmaster General, based on substantial evidence, is valid. *Donaldson* v. *Read Magazine,* 333 U. S. 178, 186.

Petitioner challenges the constitutionality of the action of the Postmaster General to prevent the sale of obscene matter through the mails, but the constitutionality of the statutes excluding obscene matter from the mails has long been established. See *Donaldson* v. *Read Magazine,* 333 U. S. 178, 190; *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 409; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *Ex parte Jackson,* 96 U. S. 727, 736. Mr. Justice Brandeis, in his dissenting opinion in the *Burleson* case, *supra,* noted that the obscenity stat-

ute of 1865 was the first case of exclusion of matter from the mails, and that the "existence * * * of the power * * * cannot be doubted." 255 U. S. at 421.

2. The questions raised by the petitioner with respect to the fraud orders are plainly without substance.

(a) The fraud orders are supported by more than ample evidence (R. 151, 166). The arousing of libidinous expectations for which persons are induced to spend money only to receive innocent matter, is fraud. *Farley* v. *Simmons*, 99 F. 2d 343 (C.A. D.C.), certiorari denied, 305 U. S. 651, approved in *Donaldson* v. *Read Magazine*, 333 U. S. 178, 189.

(b) There is no showing that the postal officials have seized any mail not relating to the subjects of the orders; nor does petitioner point to any opening of his mail or other invasion of his privacy. The evidence against petitioner was secured either by test mailings or official investigations of postal addresses and mail deliveries (R. 58, 75, 118). The argument concerning unreasonable searches and seizures is therefore groundless. See *Dunlop* v. *United States*, 165 U. S. 486, 495; *Ex parte Jackson*, 96 U. S. 727, 735.

(c) The main orders with respect to each of the books involved in this case were issued after notice and a full hearing. The supplemental fraud orders were issued without advance notice or hearing, but

upon uncontroverted evidence that the petitioner was practicing the same fraud under a different name. Petitioner complains about the summary nature of the supplemental orders, but in view of the facts, he is not in a position to claim any injury. Summary procedures to protect the public interest are often necessary and valid. *Yakus* v. *United States,* 321 U. S. 414, 442; *Federal Trade Commission* v. *Thomsen-King & Co.,* 109 F. 2d 516 (C.A. 7). Supplemental orders to prevent evasion of postal fraud orders are well-established and singularly appropriate. 39 C. F. R. (1947 Supp.) Sec. 51.26.[2] Moreover, under the Post Office Rules of Procedure, petitioner can apply for a hearing immediately upon notice of the supplemental order. 39 C. F. R. (1947 Supp.) Sec. 51.24. Petitioner filed an unsupported petition under this rule with respect to the first supplemental fraud order (*supra,* pp. 3-4), and none on the second.

Petitioner's conduct illustrates the ease with which the same fraud can be practiced under another name, and the public need for quick action to stop fraudulent collections which could be made between orders, if full notice and hearing were re-

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[2] "* * * 'supplemental orders' may be issued where it appears that a respondent against whom an order has been issued has resumed the business under a different name. Evidence is secured by complaints, test correspondence and investigation. The order issues without notice or hearing since the only question is identity and such order follows immediately upon the heels of a prior fraud order hearing." (Attorney General's Committee on Administrative Procedure, Monograph on the Post Office Department, p. 32, n. 100. Sen. Doc. No. 186, Part 12, 76th Cong., 3d sess.).

quired to prove each commission of the same fraud under different names. Moreover, petitioner does not contest the facts of identity on which the supplemental fraud order was issued against Psychic Research Press (*supra*, p. 4), and his contradictory statements about Hogarth House leaves him without any defense to the supplemental order against that fictitious name. (See, *supra*, pp. 5-6).

CONCLUSION

The judgment of the court below is clearly correct. The orders of the Postmaster General in this case were valid exercises of his statutory powers, and further review of the case is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JUNE 1949.

APPENDIX

The applicable parts of the statutes involved in this case are:

R. S. 3929, as amended (39 U. S. C. 259):

> The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

R. S. 4041, as amended (39 U. S. C. 732):

> The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor,

or to the agent of any such person or company, * * * and may provide by regulation for the return to the remitters of the sums named in such money orders.

* * * * *

Act of March 2, 1889, Sec. 3, 25 Stat. 873 (39 U. S. C. 255):

The Postmaster-General may, upon evidence satisfactory to him, that any person is using any fictitious, false, or assumed name, title, or address in conducting, promoting, or carrying on, or assisting therein, by means of the Post-Office Establishment of the United States, any business scheme or device in violation of the provisions of this act, [See 18 U.S.C. 338, 339 (1946 ed.)] instruct any postmaster at any post-office at which such letters, cards, or packets, addressed to such fictitious, false, or assumed name or address arrive to notify the party claiming or receiving such letters, cards, or packets to appear at the post-office and be identified; and if the party so notified fail to appear and be identified, or if it shall satisfactorily appear that such letters, cards, or packets are addressed to a fictitious, false, or assumed name or address, such letters, postal-cards, or packages shall be forwarded to the dead-letter office as fictitious matter.

Criminal Code Sec. 211 (18 U. S. C. 334, now 18 U. S. C. 1461):

Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * and every written

or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, * * * and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. * * *

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